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THE PERIL OF ESPIONAGE

BY JOHN B. STANCHFIELD

It is a narrow and erroneous—though commonly accepted—conception of the spy which portrays him as an erratic adventurer setting forth in war to discover and ferret out the military moves and plans of the enemy. Indeed, it may be doubted that such a description was ever sufficiently comprehensive, since the spy has in all periods of history operated in times of peace, and his machinations have been employed in diplomatic, political and civil life. To-day, at all events, the work of the secret service agent is certainly not melodramatic. It is rather a prosaic and intensely systematic, business-like occupation, pursued alike in peace and war. Romance has been eliminated from espionage, as it has from war by science and military organization.

Naturally, any estimate of the extent of the activities of foreign espionage in our country in time of peace must be, at least for us laymen, a matter of mere conjecture. The consciousness of danger from this source varies with the temperament of the individual. Some there are who think the peril is negligible, just as these same persons insist that military and naval resources are unnecessary to insure the integrity of our territory and the vindication of our national rights and honor. Others accept with credulity extravagant reports of the existence within our boundaries of organized alien forces ready, at a word from a foreign chancellery, to spring to arms and capture our principal cities.

The sane view, I believe, takes a middle ground and assumes the constant presence here of secret service agents of each of the Great Powers—agents organized and directed with more or less system toward the discovery of all important facts relating to the political, industrial, naval and military conditions of the country. From time to time our daily

papers tell us of the apprehension here or there of a foreigner having in his possession drawings of some fortification, or of the mysterious disappearance from the Bureau of Naval Construction of plans connected with the construction of a great battleship. And how many of such incidents fail to reach the light of publicity?

There results, therefore, a deepening conviction that this condition must be met by investigation and correction. But how far in this direction shall we go?

In the first place, whether or not we espouse the cause of the pacifists or of the exponents of preparedness, it would seem to be fundamental that, unless we adopt a policy of complete disarmament, we must at least safeguard the present existing defenses of the country against the covert aggression of espionage. Further, even the advocates of disarmament will not question the urgency of veiling from the scrutiny of the outside world the secret operations of our Government, particularly those of the Department of State.

But this is not all. Besides preventing the discovery of data concerning military affairs and state secrets, we must prepare to meet the danger of the actual destruction by spies of the instrumentalities of our Government and of their positive interference with every kind of internal measure designed for national protection. In this field, moreover, we must not only protect our fortresses and our battleships from mysterious destruction by fire or high explosives; we must also safeguard our national highways and means of communication—our railroads, telegraph and telephone systems, and our wireless apparatus. We must also protect all plants, factories, mills and mines engaged in or available for the production of military or naval ordnance, ammunition, stores or supplies of any kind, and those, as well, which in time of war may be indirectly connected with the military efficiency of the nation. In other words, our system of defense against espionage must embrace three broad departments:

1. The protection of the instrumentalities and operations of the Government itself, its navy and army, its forts, arsenals, and plants, its military, naval and state secrets.

2. The protection of all plants and factories not owned by the Government but directly engaged in the manufacture or production for the Government of ammunition, arms, explosives or other articles used in the conduct of warfare.

3. The protection of all agencies and instrumentalities the integrity of which in time of war would become of vital importance to the country. This class includes all factories, plants, mines, mills and other agencies in which any materials are or could be produced which would be necessary in time of war, such as clothing, foodstuffs and steel rails, and also all instrumentalities for transporting troops and war supplies and for transmitting information, such as railroads, telegraph and telephone lines and wireless apparatus.

The President of the United States has himself recently directed attention to the importance of incorporating and amalgamating our privately owned industries into the machinery of national defense and of making them an integral part of that system, by requesting the heads of the various engineering and scientific societies to undertake the work of "collecting data for use in organizing the manufacturing resources of the country for the public service in case of emergency." It is said that in the State of New Jersey alone there are eight hundred plants producing articles that would be needed by the Government in the event of war. This projected systematization of our industries would make it possible rapidly to mobilize these vitally necessary auxiliaries of the national defense. But constant maintenance of the maximum potential value of these elements of defense requires assiduous protection against espionage.

The guarding of these plants and factories involves not only the prevention of their actual physical destruction and the maintenance of secrecy as to their processes and capacity, but also the duty of securing them against paralysis produced by the fomenting of labor strikes and the enticement of workmen.

It was my initial purpose when I undertook the preparation of this paper to devote myself entirely to a consideration of what legislative measures should be adopted to bring about the results which I have outlined. But the more seriously I consider the subject, the more forcibly are there brought to my mind the comparative futility and impotence of punitive legislation as compared with administrative measures looking toward the *prevention* of the activities of espionage. The spy enters upon his undertaking with full notice of the hazards of his venture. He accepts the risks, whatever they are. He is willing, if need be, to pay the penalty of death. He is not deterred, in peace, by provisions of

penal law any more than he is restrained, in war, by the danger of summary execution. Therefore, besides punishing the offense, let us make it, as far as may be, impossible of commission.

How, then, are we to meet the problem? Three remedies suggest themselves: (1) The adoption of a policy of greater secrecy in connection with matters of national defense; (2) the adoption and development of a system of counter-espionage, in other words, a secret service engaged as a specialty in the occupation of watching and spying upon spies; and (3) punitive legislation.

I cannot express in terms too emphatic my conviction of the necessity of rigorous measures for the enforcement of secrecy in these matters of vital national concern. I firmly believe that this Government cannot too jealously guard the data concerning its military, naval and state affairs. I would recommend a law prohibiting the publication or discussion of any facts or information concerning the national defense except such as are expressly issued for publication by the Government itself. Today, unfortunately, no very ingenious system of espionage is required for the discovery of details of our armed strength. The spy, if he can read English, can ascertain almost all that he desires to know by a perusal of the *Congressional Record* alone.

Liberty to visit our fortresses and our battleships should be curtailed. The affairs of the executive offices of our military, naval and state departments should be more strictly safeguarded. The employes should be rigidly examined before acceptance, and those who handle documents and plans which might be of value to possible enemies of our country should submit to search. Harsh as this measure may seem, an honest and patriotic employe should appreciate its necessity and its value as a protection to himself and his home.

Quite as necessary as these negative precautions is the establishment of a spy system of our own—a force of trained men, preferably connected with the War Department, who will make it their business to know every foreign spy, so that his movements may be a matter of government record. Such a system of counter-espionage exists in practically every European country.

Although the existing laws go further than is ordinarily believed toward the punishment of espionage and its related activities, they are far from sufficiently comprehensive.

Treason and misprision of treason are defined and made punishable, but treason is, unfortunately, limited to levying war against the United States or adhering to their enemies, giving them aid and comfort (U. S. Const. Art 3, Sec. 3; Federal Penal Code, Secs. 1 and 2). We have also on our statute books provisions for the punishment of correspondence with foreign Governments "with an intent to influence the measures or conduct of any foreign Government . . . in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States" (Fed. Penal Code, Sec. 5); for the punishment of seditious conspiracy to overthrow, put down or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take or possess any property of the United States contrary to the authority thereof" (id. Sec. 6). The Federal Penal Code punishes also the recruiting of soldiers or sailors within the United States to engage in armed hostility against the United States, and it likewise punishes enlistment for such a purpose (id. Secs. 6 and 7). There are further provisions punishing the act of falsely pretending to be an officer of the United States, and of concealing or embezzling any arms, stores, money or other property of the United States, and punishing bribery and attempted bribery of any officer or official or employe of the United States (id. Secs. 32, 35 and 39). By Section 42 of the Federal Penal Code it is, moreover, made criminal to entice, procure or assist in desertion from the army or navy.

A most suggestive provision of the Penal Code punishes with a fine of not more than \$50 or imprisonment for not more than three months, or both, the act of enticing any artificer or workman "retained or employed in any arsenal or armory to depart from the same during the continuance of his engagement or to avoid or break his contract with the United States" (Sec. 43). But this provision is limited to plants actually owned and operated by the United States.

Physical injury to fortifications or other military or naval works is punished with a fine of not more than \$5,000 or imprisonment for not more than five years, or both (id. Sec. 44). Similarly, injury to telegraph, telephone or cable systems is punishable by a fine of not more than \$1,000 or im-

prisonment for not more than three years, or both, but only when such systems are operated or controlled by the United States (id. Sec. 60). Arson of buildings or works, the property of the United States, is punishable by a fine of \$5,000 and imprisonment for twenty years (id. Sec. 286).

With the exception of the sections punishing injury to the military or naval works or other property of the United States, and those relating to the enticement of desertion or the enticement of workmen from Federal shops, these penal provisions, over which I have cursorily passed, are not directed specifically or intentionally to the prevention or punishment of the acts which are embraced within the meaning of the word "espionage." It is only because the spy frequently finds it necessary, in order to accomplish his purpose, to resort to the commission of what we may call an ordinary crime, that he brings himself within the purview of those more or less general provisions.

Before the year 1909 there seems to have been no statute, aside of course from the Articles of War, for the punishment of spying as such. In that year there was enacted what is now Sec. 45 of the Federal Penal Code, punishing with fine and imprisonment the unlawful entry upon any fort, military reservation or army post. Finally, in 1911, there was passed a law entitled "An act to prevent the disclosure of national defense secrets" (Act of March 3, 1911, Chap. 226; 36 Stat. at L. 1084), now Sections 45a and 45b of the Federal Penal Code. These two sections attempt to cover the entire subject of obtaining unlawful information respecting the national defense. The first punishes, with imprisonment for one year, or a fine of \$1,000, or both, any person who—

(1) For the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel or enters any navy yard, naval station, fort, battery, torpedo station, arsenal, camp, factory, building, office or other place connected with the national defense, owned or constructed or in process of construction by the United States, or in the possession or under the control of the United States or any of its authorities or agents;

(2) When lawfully or unlawfully upon any vessel or in or near any such place, without proper authority, obtains, takes or makes, or attempts to obtain, take or make any document, sketch, photograph, photographic negative, plan, model or knowledge of anything connected with the national defense to which he is not entitled;

(3) Without proper authority receives or obtains, or undertakes

or agrees to receive or obtain from any person any such document, sketch, photograph, etc., knowing the same to have been so obtained, taken or made;

(4) Having possession of or control over any such document, sketch, photograph, etc., willfully and without proper authority, communicates or attempts to communicate the same to any person not entitled to receive it, or to whom the same ought not in the interest of the national defense be communicated at that time; or

(5) Being lawfully intrusted with any such document, sketch, photograph, etc., willfully and in breach of his trust, so communicates or attempts to communicate the same.

Section 45b provides that anyone who has committed an offense under the preceding section, and who communicates or attempts to communicate to any foreign Government any of the documents or information so obtained or intrusted to him, shall be imprisoned for not more than ten years.

Even with the specially added provisions to which I have just referred, the existing laws are entirely inadequate to meet or cope with the activities of espionage. The entire body or system of legislation is unsound in principle and deficient in scope.

The sections relating to the surreptitious obtaining of information concerning the national defense do not recognize any distinction whatever between the procurement of such information by an alien spy in the employ of a foreign Government and the communication or betrayal of such secrets by a citizen or by an official of the Government to whom they have been intrusted. Manifestly there is a great moral and ethical distinction between these two acts. The former, though injurious to our national interests, involves little or no turpitude, for the alien resident owes us legally but a qualified allegiance and morally little if any duty. The latter is a flagrant violation of a sacred obligation, if not literally of the oath of allegiance to the nation. My first suggestion, therefore, is that our legislation on this subject should differentiate between such acts, even if of the same character, when committed by aliens and when committed by citizens. When done by an alien, the act should be punishable as one of espionage; when perpetrated by a national, it should be punishable as treachery. We cannot, without a Constitutional amendment, make such an act, especially when committed in times of peace, an act of treason, because the Constitutional definition of treason is exclusive. But there would seem to

be no reason why Congress can not classify such acts and give them the name of treachery. Moreover, I believe that the punishment of such treachery should be more severe in the case of an official, who would thereby commit a breach of an express trust, than in the case of a citizen who has no connection with the national defense.

And further, in the case of persons intrusted with the safeguarding of national secrets or property, the legislature should constitute it a crime negligently to permit such secrets to fall into the possession of unauthorized persons, or such property to be damaged, destroyed or illegally removed. An official or employee of the United States should be held to a more strict accountability than that merely for positive wrongdoing or breach of trust. Such an official should, on the contrary, be charged affirmatively with the safety of the secrets or property committed to his care.

In the next place, I believe that the theory of punishing misprision of treason should be extended so as to apply to acts of espionage and treachery as above defined. In other words, the law should make it criminal for a person within the United States, having knowledge or reasonable ground to believe that such an offense is about to be or has been committed, not to make prompt report to the proper officers.

To recapitulate the foregoing suggestions, they are:

1. The differentiation between espionage and treachery.
2. The creation of an offense which, for brevity, we may call misprision of espionage or misprision of treachery.
3. The creation of an offense of criminal negligence in guarding the nation's secrets and property.

There still remains to be considered the kind of activities against which the laws on this subject shall be directed; in other words, the scope and extent of the legislation to be constructed in conformity with these legal principles. Our present legislation fails entirely to protect the secrets, documents and archives of the Department of State, and the factories, mines, railroads and other privately owned properties which, in the event of war, would be most intimately connected with the national defense. There must, therefore, be an enlargement of the scope of the statutes which punish the obtaining of information concerning the national defense and which punish physical injury to forts, factories and armories of the United States, the enticement of desertion from the army or navy, and the enticement of workmen or

artisans from the arsenals or factories of the United States.

All governmental records should be included within the purview of the statute relating to the improper procurement of information—the secrets of the Department of State and the data about to be collected with respect to the organization of the national resources, as well as all military and naval secrets. Also, we must punish any interference with privately owned plants, factories, mills, mines, railroads or other enterprises engaged, or which have been or may be engaged in the construction, manufacture or transportation of any arms or ammunition or stores for the army or navy, and also any interference with our privately operated telegraph, cable and telephone lines and wireless systems. With the completion of the planned systematization of our manufacturing and industrial resources, it should be possible to draft a law defining with sufficient particularity the agencies of this character relating to the national defense. But if such a statute is found inadvisable, I would suggest a provision of penal law prohibiting in general terms any interference with plants, factories or other enterprises connected with the national defense, and authorizing the Secretary of War to designate from time to time such plants, factories and enterprises as, by reason of their activities or the adaptability of their machinery or other features, are in fact connected with the national defense. These agencies so designated by public proclamation would then come automatically within the intendment and purview of the general statute. Further, with respect to such plants, any law on the subject should punish not only actual physical injury, but also any interference with the sources of supply, either of materials or implements or of labor. In thus forbidding interference with labor, the suggested measure would be an enlargement of the present provision relating to the enticement of workmen from Federal factories and arsenals. Of course, any statute designed to effect this purpose would be carefully framed so as to condemn not the ordinary industrial strikes, but only interference with labor when brought about with the intent to embarrass the measures of the Government.

There will arise, of course, the query as to how far Congress may go in the direction of my suggestions without transcending its Constitutional limitations. In so far as legislation is required in order to protect privately owned means of transportation and communication, the interstate com-

merce clause of the Constitution is ample to empower Congress to enact the necessary measures. The other proposed subjects of legislation, it is pertinent to consider, are embraced within the following powers expressly conferred upon Congress by the Constitution:

12. To raise and support armies ;
13. To provide and maintain a navy;
14. To make rules for the government and regulation of the land and naval forces;
15. To provide for calling forth the militia;
16. To provide for organizing, arming and disciplining the militia;
17. To exercise exclusive legislation in all cases whatsoever over such district as may become the seat of government of the United States; and to exercise like authority over all places purchased by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings; and
18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States or in any department or officer thereof. (Constitution, Art. 1, Sec. 8.)

In addition to these express powers, the Government of the United States, like any government, has, inherently, the power to maintain and preserve its own integrity.

The only suggestion which, in my opinion, would raise even a debatable Constitutional point is that relating to the protection of privately owned plants and factories which are or can be used for the national defense. In so far as the statute may be able specifically to mention or accurately to define plants then in use for the manufacture or construction of supplies necessary for national defense, I can see no Constitutional objection, for without the right to protect the agencies engaged in the production of munitions or supplies of war, the Government would not be able to "provide and maintain a navy" or to "raise and support armies." With respect to a general provision covering factories and plants to be designated from time to time by the Secretary of War, there may be some question, but I think that upon study such a provision will be found to be Constitutional. The possible objection would be that an attempt to vest such a power in the Secretary of War is unconstitutional in permitting an executive officer to exercise the function of legislation. But

this ground does not appeal to my reason. The legislature defines the offense as interference with a plant connected with the national defense, and it places upon the Secretary of War merely the duty of proclaiming the existence of the facts with respect to such factories or plants as are in truth connected with the national defense. There is some precedent for such a law. In the case of our reciprocity treaties, the President is authorized by proclamation to declare the existence of such a state of facts as will bring into effect a reduction of our tariff rates. Again, in the case of the administration of our immigration laws, administrative officers are invested with the power of determining whether incoming aliens are or are not desirable citizens, and the decisions of the immigration officers are not reviewable by the courts, but are conclusive, except where there has been such flagrant abuse of discretion that it can be said that the officials have entirely failed to attempt a compliance with the law.

However, if the Constitutionality of any part of the proposed legislation should be deemed doubtful, I believe that the exigencies of the situation warrant a Constitutional amendment. The necessity of legislation to protect our privately owned enterprises must be manifest. In times of peace a shoe factory or a plant engaged in the manufacture of clothing, having especially developed facilities for the production of army stores and supplies, may not have a single government contract, and would therefore be at the mercy of a system of spies intent upon the demoralization of its labor force or the actual physical destruction of its machinery. If the Secretary of War were empowered to designate such a plant as one connected with the national defense, this factory could be protected by the Federal Secret Service and by the proposed system of counter-espionage.

Without some comprehensive scheme of this character for the protection of our industrial auxiliaries of national defense, the nation will always be vulnerable. If a thoroughly organized system of espionage is to be able to destroy, or to entice workmen from, our privately owned ammunition plants and from our copper mines, and to foment strikes and industrial disorders in our railroads and to cripple our means of communication, we shall be utterly at the mercy of a foreign enemy, no matter how strong or well protected from secret scrutiny may be the actual military and naval arms of the Government.

JOHN B. STANCHFIELD.